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Court of Appeals
Division III
State of Washington

34055-4-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JUSTIN R. GRAHAM, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The evidence was insufficient to prove Justin Graham committed the crime of intimidating a witness.

2. The trial court erred in entering Finding of Fact 8 that there was sufficient evidence that "another motivation [of Justin Graham] was to attempt to influence Mr. Maupin's testimony in the assault case."

3. The trial court erred in entering judgment against Mr. Graham.

4, If the State substantially prevails on appeal, any request for appellate costs should be denied.

II. ISSUES PRESENTED

1. Whether sufficient evidence exists to persuade a rational trier of fact beyond a reasonable doubt that Mr. Graham, by use of a threat against a current or prospective witness, Don Maupin, attempted to influence his testimony in Mr. Graham's pending assault case?

2. Do the findings of fact, read as a whole, support the trial court's conclusion of law 8, where the court found, in part, that one of Mr. Graham's motivations for directing his brother to "smash in" Mr. Maupin's face was an attempt to influence Mr. Maupin's testimony in Mr. Graham's pending assault case?

III. STATEMENT OF THE CASE

The defendant, Justin Graham, was charged by information in the Spokane County Superior Court with one count of intimidating a witness. CP 1. Mr. Graham waived his right to a jury trial and the matter proceed to a bench trial in front of the Honorable James Triplett. RP 5-7; CP 2. Mr. Graham was ultimately convicted by the court as charged. CP 49-67; RP 418-66. Mr. Graham was sentenced to a standard range sentence, and this appeal timely followed. CP 19-32.

Facts

On June 28, 2015, Tekeisha Horn observed April Fagan run out of her apartment, crying. RP 88. The defendant, Justin Graham, followed Ms. Fagan, grabbed her by the neck, pinched her, and pulled her back into the apartment. RP 88, 134. Don Maupin also observed this commotion and heard the defendant remark: "You think this is choking? I'll show you choking, bitch." RP 135. Ms. Horn yelled at Mr. Graham to leave Ms. Fagan alone and informed him that she was calling the police. RP 88. Mr. Graham turned toward Ms. Horn and said "Fuck you, you fucking bitch. You're a fucking cunt. You're a ho. Get out of here." RP 91, 137. Ms. Horn subsequently called 911. RP 94. At the time, Ms. Fagan was Mr. Graham's girlfriend. RP 72.

Officer Lance Fairbanks responded to the domestic violence assault call at the apartment complex located at 525 West Sinto in Spokane. RP 37-38, 41, 73, 86.[1] Mr. Maupin and Ms. Horn provided statements to Officer Fairbanks regarding the assault. RP 39.

Shortly after the assault, the defendant's brother, Brandon Graham,[2] arrived as the police attempted to get Justin Graham out of his apartment. RP 96-97. As the defendant was being walked to the patrol car in handcuffs, he remarked to Brandon that it was Mr. Maupin and Ms. Horn that called the police. RP 97-98, 119, 122. He also mouthed to Mr. Maupin: "You're dead." RP 141-42.[3] Shortly thereafter, Brandon yelled at Mr. Maupin: "You're dead. You snitched on my brother. You're dead." RP 134, 162. Mr. Maupin believed Brandon wanted to assault him. RP 140, 144.

After Mr. Graham's arrest, he was subsequently housed in the jail pending the domestic violence charge. RP 128. Officer Nick Geren, of the Spokane Police Department, determined Mr. Graham called several

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[1] Mr. Graham, Ms. Fagan, Ms. Horn and Mr. Maupin were residents at the apartment complex. RP 41, 73, 129, 131.

[2] Brandon Graham will be referred to by first name for clarity.

[3] The trial court accorded no weight to this statement as it was made outside of the charging period as contained within the information. CP 65 (conclusion of law 6).

individuals while incarcerated in the jail. RP 210-11.[4] On July 2, 2015, Mr. Graham telephoned Ms. Fagan from jail. RP 211; EX. D103. During the call, he spoke with his brother Brandon.

> BRANDON GRAHAM: Yeah hello.
>
> JUSTIN GRAHAM: What's up?
>
> BRANDON GRAHAM: Hey what's up, bro?
>
> JUSTIN GRAHAM: Well I just talked to DOC today and I got, I got twenty days violation, that's it. But I'm trying to figure out what's up on the, on the DV assault charge cause fuckin, uh, fuckin, Don and his girl, fuckin, are, are my witnesses, our witness saying that they fucking, that I, uh, they, they said all kinds of shit on my shit dude. They need to get their faces smashed in, both them.
>
> BRANDON GRAHAM: Yeah, I tried to run em over and fucking hop out the car and break his face, last night when there was I saw I was on camera so I had to take off, came back next morning, had him hemmed up, got my mother fucking (INAUDIBLE) but I need to get him off camera.
>
> JUSTIN GRAHAM: I know. Um, yeah, cause they, uh, and then I went to court and they're saying that Don, Don went there saying that I did all kinds of shit to April and all bunch of weird of shit. But hey I was told that, uh, somebody in here told me that if you put money on my books on Fri[day] or on Saturday that I, uh, that they won't take it from me.

EX. D103 at pp. 6-7; RP 221, 250.

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[4] Once an inmate is booked into jail, he or she can create a personal phone account at the jail to use a jail telephone. RP 180, 184. When an inmate uses a jail phone, he or she is advised the phone call is being recorded by the jail. RP 182, 192, 195.

During this same conversation Mr. Graham and Brandon discussed his court date.

> JUSTIN GRAHAM: Today's Thursday, tomorrow's Friday, yeah no, I'm locked down all weekend so, starting tomorrow so but yeah I talked to DOC and I only got twenty days violations and, uh, I'm just waiting for, to find out if, back in the day, um, DV though, didn't they, don't they used to don't they just used to give you time served and kick you out though, isn't that what they used to do?
>
> BRANDON GRAHAM: Yeah, they used to.
>
> JUSTIN GRAHAM: So, yeah, I'm hoping they, see my, my court date's not until the twenty-ninth though.
>
> BRANDON GRAHAM: The twenty-ninth.
>
> JUSTIN GRAHAM: July twenty-ninth.
>
> BRANDON GRAHAM: Damn.
>
> JUSTIN GRAHAM: Yeah, I know. So I'm gonna be here at least till then.

EX. D103 at pp. 7-8; RP 237-38.

On July 16, 2015, Mr. Graham was still an inmate in the jail. He again spoke with Ms. Fagan by telephone.

> APRIL FAGAN: Um, I talked to your brother Josh.
>
> JUSTIN GRAHAM: What'd he say?
>
> APRIL FAGAN: Before the other number got shut off, um, he said he's mad at you cause you went back to jail he said but it's alright, you won't be in there that long. I told him why. He said well I'm gonna whoop, it may be a while before I get out but I'm whoopin Donny's ass. Wait till I get

> out. I don't know who he is but I'm getting him. I was like alright I will, I will gladly show you who he is when you get out. He goes alright, remember that cause I will.
>
> JUSTIN GRAHAM: But Brandon, Brandon split his head open (INAUDIBLE).
>
> APRIL FAGAN: Yeah, oh and your brother also said he was gonna fuck up Brandon because Brandon's actin a fool and there's no way he shouldn't, that he shouldn't be helping me out.

EX. D104 at pp. 12-13; RP 211, 250.

In conjunction with the above conversations, several days after the assault involving the defendant and his girlfriend, Brandon attempted to run over Mr. Maupin with his car and then he tried to hit Mr. Maupin with brass knuckles. RP 145. His attempt to strike Mr. Maupin was thwarted because he was told he was being recorded by a video camera. RP 145-46.

Subsequently, on approximately July 9, 2015, Brandon successfully struck Mr. Maupin with brass knuckles. RP 60, 102, 107-08. Just prior to the assault, Brandon remarked: "This is for snitching on my brother." RP 149, 165. Mr. Maupin suffered an injury near his eyebrow which required medical attention. RP 57.

Mr. Maupin and Ms. Horn subsequently moved from the West Sinto apartment because they were fearful of the defendant and Brandon. RP 111, 152.

The trial court's findings of fact.

On September 28, 2016, the trial court entered amended[5] findings of fact and conclusions of law. CP 51-67. Mr. Graham has not assigned error to the findings of fact. In sum and in relevant part, the trial court found a Spokane police officer obtained probable cause to arrest Mr. Graham on June 28, 2015, for city assault – domestic violence based on the statements made by Mr. Maupin and Ms. Horn. CP 52 (findings of fact 1, 3, 12, 13, and 16). Several days after Mr. Graham's arrest, Brandon tried to hit a group of people, including Mr. Maupin, with his Subaru car. CP 56-57 (finding of fact 18). Brandon is Mr. Graham's brother. CP 60 (finding of fact 25). Shortly after attempting to run him over, Brandon attempted to strike Mr. Maupin with brass knuckles, which Mr. Maupin ultimately deflected. CP 57 (finding of fact 18).

Subsequently, Spokane police contacted Mr. Maupin on July 9, 2015, at the Deaconess emergency room and observed Mr. Maupin had been assaulted. CP 52 (findings of fact 6 and 7). Brandon Graham was developed as a suspect for that assault. CP 53 (findings of fact 8 and 14). Mr. Maupin identified Brandon as the individual who hit him with brass knuckles. CP 57 (finding of fact 19). Mr. Maupin was convinced it was

[5] The original findings of fact and conclusions of law entered by the court had omitted a page.

related to the earlier domestic violence call involving Justin Graham. CP 19 (finding of fact 19).

The trial court further found on July 2, 2015, Mr. Graham placed a telephone call to Ms. Fagan, and he spoke with his brother Brandon:

> "Well, I just talked to DOC today, and I got - I got 20 days violation; that's it. But I'm trying to figure out what's up on the -- on the DV assault charge because fuckin', uh, fuckin' Don and his girlfriend, fuckin' are - are my witnesses, our witness saying that they are fuckin' -- that I, uh, they -- they said all kinds of shit on my shit dude. They need to get their faces smashed in, both them." Brandon Graham: "Yeah, I tried to run 'em over and fucking hop out the car and break his face last night when there was -- I saw I was on camera so I had to take off; came back next morning, had him hemmed up, got my mother fucking" inaudible (sic) "but I need to get him off camera." Justin Graham: "I know. Um, yeah, 'cause they, uh, and then I went to court and they're saying that Don, Don went there saying that I did all kinds of shit to April and all bunch of weird shit."

CP 60 (finding of fact 27).

Mr. Graham placed a second telephone call to Ms. Fagan on July 16, 2015:

> April Fagan: "Um I talked to your brother Josh." Justin Graham: "What'd he say? April Fagan: "Before the other number got shut off, um, he said he's mad at you 'cause you went back to jail. He said, but it's all right. You won't be in there that long. I told him why. He said, Well, I'm going to whoop -- it may be a while before I get out, but I'm whooping Donny's ass. Wait 'til I get out. I don't know who he is, but I'm getting him. I was like, All right, I will. I will gladly show you who he is when you get out. He goes, All right, remember that because I will" Justin Graham: "But Brandon, Brandon split his head open." Inaudible (sic). April

> Fagan: Yeah. Oh, and your brother also said he was going to fuck up Brandon because Brandon's acting a fool and there's no way he shouldn't, that he shouldn't be helping me out."

CP 60 (finding of fact 28).

Mr. Graham was an inmate when he placed the telephone calls to Ms. Fagan, with a pending domestic violence charge. CP 58-60 (findings of fact 21, 22, 23, 24, 25, 26, 27, 28).

Mr. Maupin and Ms. Horn subsequently moved from the apartment complex, in part, because they felt Mr. Graham and his brother were a threat. CP 58 (finding of fact 20).

IV. ARGUMENT

A. VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE AND DRAWING ALL REASONABLE INFERENCES FROM THE EVIDENCE, MR. GRAHAM, BY USE OF A THREAT AGAINST A CURRENT OR PROSPECTIVE WITNESS, MR. MAUPIN, ATTEMPTED TO INFLUENCE HIS TESTIMONY.

Mr. Graham argues the evidence was insufficient to prove he attempted to influence Mr. Maupin's testimony. Appellant's Br. at 6. He further maintains that the trial court erred in entering conclusion of law 8 where the court found "that there was sufficient evidence that 'another

motivation [of Justin Graham] was to attempt to influence Mr. Maupin's testimony in the assault case.'" Appellant's Br. at 1.[6]

In this regard, the trial court entered conclusion of law 8, which states:

> The only remaining argument was that Justin and Brandon Graham's discussions to assault Mr. Maupin would have been as a consequence of his calling 911 and reporting the assault to the state instead of an attempt to influence the testimony of that person. A careful look at Justin Graham's statements in the first recorded phone call indicate that he was thinking about what would happen with the domestic violence assault charge. He initially reported to his brother that he had talked to the Department of Corrections, and he was only getting a 20-day violation. Justin Graham said he was trying to figure out what was happening with the domestic violence assault charge because Mr. Maupin and his girlfriend are witnesses that are saying all kinds of things against him. They need to get their faces smashed in, both of them. After Brandon Graham said he had tried to run them over before he found out he was on camera and that he needed to get Mr. Maupin off camera, Justin Graham then responded, "I know, yeah, because when I went to court, they're saying that Don said that I did all kinds of shit to April, all kinds of weird shit to April." Again, the focus of Mr. Graham was the fact that Don was a witness to Justin Graham's assault of April Fagan. While Justin Graham may have had several motives for wanting Mr. Maupin to get his face smashed in, including to Mr. Maupin for calling 911 on June 28, 2015. The Court was satisfied that another motivation was to attempt to influence Mr. Maupin's testimony in the assault case. The Court has no reasonable

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[6] Mr. Graham references the trial court's finding of fact 8 in his assignment of error number one. This appears to be a scrivener's error and, instead, he was identifying conclusion of law 8.

> doubt that that is a fair interpretation of the evidence in the case.

CP 66.

Standard of review.

The State bears the burden of proving all the elements of an offense beyond a reasonable doubt. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). An insufficiency of the evidence claim "admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 364, 256 P.3d 277 (2011). Such inferences "must be drawn in favor of the State and interpreted most strongly against the defendant." *Salinas*, 119 Wn.2d at 201.

"Specifically, following a bench trial, [an appellate court's] review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law." *State v. Homan*, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of

the truth of the finding. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

The State may establish the elements of a crime by either direct or circumstantial evidence and both are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). As stated by this Court in *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009), *review denied*, 168 Wn.2d 1041 (2010): "Appellate courts do not hear or weigh evidence, find facts, or substitute their opinions for those of the trier-of-fact. Instead, they must defer to the factual findings made by the trier-of-fact." Moreover, the credibility of witnesses and the weight of the evidence is the exclusive function of the trier of fact, and not subject to review. *Id.* at 717.

As charged in the information and to convict Mr. Graham of intimidating a witness, the State had to prove that he made a threat, that the threat was made against a current or prospective witness, and he attempted to influence the testimony of that witness. RCW 9A.72.110(1)(a); CP 1.[7]

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[7] The statute provides in relevant part: "A person is guilty of intimidating a witness if a person, by use of a threat against a current or prospective witness, attempts to: (a) Influence the testimony of that person;" RCW 9A.72.110(1). The statute also defines "threat" as: "To communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time; or ... as defined in RCW 9A.04.110(27)." RCW 9A.72.110(3). The statute further defines "current or prospective witness" as "(i) A person endorsed as a witness in an official proceeding;

The communication must be an intentional act. *State v. Ozuna*, 184 Wn.2d 238, 249 n. 4, 359 P.3d 739 (2015). In addition, when a defendant directs a threat under RCW 9A.72.110, it can be communicated to a third party, and not necessarily to the intended victim. *Id.* at 251 (interpreting the "former witness" prong of the intimidating a witness statute, RCW 9A.72.110(2)).

In assessing the sufficiency of a threat, an appellate court may consider the inferential meaning of the words used and the context in which they were used. For instance, in *State v. Rempel*, 114 Wn.2d 77, 785 P.2d 1134 (1990), a witness tampering case, the State charged the defendant with attempted rape. The defendant called the victim from jail and apologized, stated "it" was going to ruin his life, and asked the victim to "drop the charges." *Id.* at 83. The Supreme Court first looked at the defendant's literal words, noting they did not contain a request to withhold testimony, an express threat, or a promise of any reward, but rather reflected a lay person's perception that the complaining witness can cause a

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(ii) A person whom the actor believes may be called as a witness in any official proceeding; or (iii) A person whom the actor has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child." RCW 9A.72.110(2)(b).

prosecution to be discontinued. *Id.* Although the defendant's literal words did not contain an attempt to induce the victim to withhold testimony, the court reasoned the fact-finder "is entitled to rely on the inferential meaning of the words and the context in which they were used." *Id.* at 83–84; *See, State v. Gill*, 103 Wn. App. 435, 445, 13 P.3d 646 (2000) (applying the same rational to the intimidating a witness statute).

Here, Mr. Graham's threat, as a whole and in context, can be construed as attempting to influence Mr. Maupin's testimony, both directly and inferentially. A fact-finder could reasonably infer that on July 2, 2015, during a telephone conversation with his brother and at which time he had a domestic violence charge pending, Mr. Graham was concerned about the statements made by Mr. Maupin, a witness to the domestic violence charge; pending trial, he instructed his brother to "smash in" the faces of Mr. Maupin and Ms. Horn. It was reasonable for the trial court to infer that Mr. Graham believed Mr. Maupin would be called as a witness regarding statements made to the police about the domestic violence charge and he wanted Mr. Maupin injured to influence any statements made in court regarding the domestic violence charge.

The timing, content, and circumstances surrounding the threat were sufficient to allow the court to infer Mr. Graham made threat to influence Mr. Maupin's testimony because of statements he made regarding the

domestic violence charge, and from which the court found the elements of intimidation of a witness beyond a reasonable doubt.

Mr. Graham relies on *State v. Brown,* 162 Wn.2d 422, 173 P.3d 245 (2007). In *Brown*, the defendant told a woman that "she would 'pay' if she spoke to the police," and she believed this was a credible threat against her personal safety. *Id.* at 426. The court reversed the defendant's conviction for intimidating a witness because he attempted to prevent the woman from providing any information to the police, not influence her testimony. *Id.* at 430. The threat in *Brown* was a specific threat that could not have been construed as including trial or testimony. Here, the charge had already been filed regarding the domestic violence assault, and a court date was pending.

State v. Jensen, 57 Wn. App. 501, 789 P.2d 772 (1990), is equally inapposite to the facts of the present case. In *Jensen*, the defendant stole his parent's jewelry. The parents repurchased their jewelry from a drug dealer. The defendant offered to pay his mother $150 if she would "drop the charge or make it a lesser charge," and threatened to "tear up the house and take anything ... valuable." *Id.* at 509. The court held that the evidence was insufficient to support the intimidating a witness conviction because the defendant's statements "reflect[ed] only 'a lay person's perception that the complaining witness can cause a prosecution to be discontinued'" and would not have affected the mother's decision whether to testify. *Id.* at 510.

The *Jensen* court's decision was based on *Rempel, supra*, in which the Supreme Court held that the "literal words" in a request to "drop the charges" were not a request to withhold testimony; rather, they merely "reflect[ed] a lay person's perception that the complaining witness can cause a prosecution to be discontinued." *Rempel*, 114 Wn.2d at 83.

In both *Brown* and *Jensen*, the State relied on verbal statements made by those defendants. Here, unlike *Brown* and *Jensen*, the threat was specific and not ambiguous, and made to a prospective witness whom the defendant believed was making statements in court. Moreover, in both *Brown* and *Jensen*, the State relied on verbal statements made by those defendants in their attempt to make the witnesses absent him or herself from court. Here, Mr. Graham, through his words and conduct, specifically intended to intimidate Mr. Maupin into changing his testimony.

B. THE IMPOSITION OF APPELLATE COSTS IS DISCRETIONARY WITH THIS COURT.

Mr. Graham, through counsel, preemptively objects to the imposition of costs being imposed for this appeal. Mr. Graham should file a report of continued indigency in compliance with this Court's June 10, 2016 directive. The discretionary determination of whether appellate costs should be imposed is within the sound province of this Court.

V. CONCLUSION

Mr. Graham believed Mr. Maupin was making statements in court about the domestic violence charge and he ordered his brother to cause bodily injury to Mr. Maupin because of his belief regarding the statements made in court. The timing, content, and circumstances surrounding the threat was sufficient to allow the court to infer Mr. Graham made the threat to influence Mr. Maupin's testimony, and from which the court found the elements of intimidation of a witness beyond a reasonable doubt.

For the reasons stated herein, the State requests this Court affirm Mr. Graham's conviction for intimidating a witness.

Respectfully submitted this 19 day of December, 2016.

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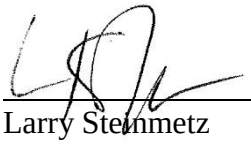

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Respondent, v. JUSTIN R. GRAHAM, Appellant.	NO. 34055-4-III CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on December 19, 2016, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Lisa Tabbut
ltabbutlaw@gmail.com

12/19/2016	Spokane, WA	
(Date)	**(Place)**	**(Signature)**